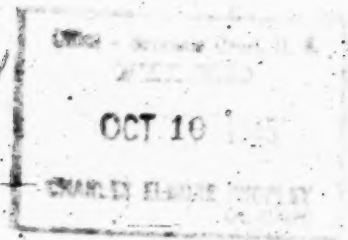


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No. 51

In the Supreme Court of the United States

OCTOBER TERM, 1945

FOREST E. LEVERS, ADMINISTRATOR, ETC.,
PETITIONER

v.

A. V. ANDERSON, DISTRICT SUPERVISOR, ALCOHOL
TAX UNIT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Circuit Court of Appeals
(R. 457-458) is reported in 147 F. 2d 547.

JURISDICTION

The judgment of the Circuit Court of Appeals
was entered on January 23, 1945 (R. 459). A
petition for rehearing and modification (R. 459-
460) was denied on February 23, 1945 (R. 460-
461). The petition for writ of certiorari was
filed in this court on March 27, 1945. The juris-
diction of this court is invoked under Section 4

(h) of the Federal Alcohol Administration Act (c. 814, 49 Stat. 977) and Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, as the court below seemingly held, a petition for rehearing is an administrative remedy prerequisite to judicial review.

2. If not, whether the application for reconsideration permitted by the regulations under the Federal Alcohol Administration Act is a prerequisite to judicial review.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. 201, are printed in Appendix A, *infra*, pp. 27-31. The controlling regulations are the Treasury Regulations relating to industrial alcohol, 26 C. F. R. Cum. Supp. 182.245-257, 7 Fed. Reg. 1858, 1889-1890; by an order of the Secretary of the Treasury issued July 9, 1940 the procedure prescribed in those regulations for issuing, denying and revoking permits was "extended to the issuance, amendment, denial, revocation, suspension and annulment of basic permits under the Federal Alcohol Administration Act, in so far as applicable and in so far as such procedure is not in conflict with the provisions of such Act." 26 C. F. R. Cum. Supp. 171.4d, 5 Fed. Reg. 2550. The pertinent pro-

visions of these regulations are set forth in Appendix B, *infra*, pp. 32-37.

Reorganization Plan No. III (54 Stat. 1231; 5 U. S. C. 133t note), prepared pursuant to the Reorganization Act of 1939 (53 Stat. 561), which became operative June 30, 1940, by Joint Resolution of June 4, 1940 (54 Stat. 230, 231; 5 U. S. C. 133u), provided that the Federal Alcohol Administration, the offices of the members thereof and the office of Administrator should be abolished and the functions of the Administrator "administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue." The Secretary of the Treasury delegated the functions of the Administrator "to the Deputy Commissioner of the Bureau of Internal Revenue in charge of the Alcohol Tax Unit, to be exercised by him under the direction and supervision of the Commissioner of Internal Revenue and the Secretary of the Treasury." (Treasury Order No. 30, 26 C. F. R. Cum. Supp. 171.4a, 5 Fed. Reg. 2212.) Subsequently the power previously vested in the Deputy Commissioner to issue, deny, revoke, and suspend basic permits was "also hereby delegated to District Supervisors of the Alcohol Tax Unit, to be exercised by them, subject to the supervision and direction of the said Deputy Commissioner." (Treasury Decision 4982, 26 C. F. R. Cum. Supp. 171.4c, 5 Fed. Reg. 2549.)

STATEMENT

On December 26, 1941, petitioner (with a temporary co-administrator)¹ received a wholesaler's basic permit under the Federal Alcohol Administration Act (R. 170). On November 5, 1943 respondent, District Supervisor, Alcohol Tax Unit of the Bureau of Internal Revenue, issued an order to show cause why the permit previously issued should not be annulled (R. 146). On November 29 petitioner applied for a new wholesaler's basic permit and for an importer's basic permit (R. 171-172, 181-182). On December 18, pursuant to the procedure prescribed in Section 4 (b) of the Act, respondent notified petitioner of the contemplated denial of the applications unless petitioner applied for a hearing within fifteen days (R. 180-181, 191-193).

The order to show cause why the wholesaler's basic permit should not be annulled charged that the permit was subject to annulment under Section 4 (e) (3) of the Act because it had been obtained by concealment and misrepresentation of material facts relating to the ownership or con-

¹ The business enterprise here involved was originally owned by petitioner Forest Levers and his brother Ray Levers. Upon Ray's death in 1941, Forest and Oran C. Dale were appointed co-administrators (R. 166, 168), but Dale was discharged as co-administrator upon his entrance into military service (R. 179). The business has since been owned by Forest Levers as co-partner and as administrator for his brother. We shall refer to Forest Levers as petitioner without differentiating between his several capacities.

trol of another corporation and to the ownership or control, in violation of Sections 5 (a) and 5 (b) of the Act, of outlets selling alcoholic beverages at retail (R. 146-148). The basis of the charge made in each of the notices of contemplated denial (R. 180-181, 191-193) was that the evidence in the pending annulment proceedings was persuasive that the business proposed to be carried on would not be maintained in conformity with law. In a letter to petitioner giving more fully the reasons for the contemplated denial of petitioner's applications for basic permits, the respondent stated that petitioner's business practices result in control of certain retail outlets for spirits, wines or malt beverages in the State of New Mexico, that such control "affects the purchasing policies of these outlets" as to liquors moving in interstate commerce, and that "Levers Brothers would continue to control the path" of such liquor to their own advantage and the disadvantage of others (R. 198-199).

Petitioner requested a hearing on the order to show cause why its wholesaler's basic permit should not be annulled and on each of the two notices of contemplated denial (R. 193-194). The hearings in the three proceedings were consolidated (R. 4-6). Although petitioner took part in the hearing, he introduced no evidence in his behalf.

After the hearing, the Hearing Officer made a consolidated report (R. 377-421) in which he found that petitioner had made the misrepresentations of fact charged and had withheld material facts as charged (R. 418-421). The evidence supporting these findings showed that through a dummy corporation Levers Brothers in part owned and in part controlled a chain of retail liquor stores which served as an outlet for its wholesale liquor business (R. 14-47, 53-87, 253-298, 341-343) and that these facts were concealed and withheld by them in their applications for basic permits (R. 163, 175-176, 188-189).

The Hearing Officer's findings were adopted by respondent, the District Supervisor. On the basis of these findings he issued an order of annulment, an order denying the application for a wholesaler's basic permit, and an order denying the application for an importer's basic permit (R. 421-427).

The controlling regulations (*infra*, pp. 35-36) permitted petitioner to apply to the District Supervisor for reconsideration of his order, the order being automatically stayed for 20 days to allow time for the application to be made, and until final disposition of the application. Such reconsideration would have allowed the petitioner to except to the findings and to argue before the District Supervisor for the first time. See pp. 18-20, *infra*. The regulations also permitted appeal to the Deputy Commissioner of Internal Revenue

after reconsideration by the District Supervisor, but provided that "Appeal to the [Deputy] Commissioner is not required" (*infra*, p. 37).

Petitioner pursued neither of the two methods available for administrative relief, but filed in the Circuit Court of Appeals a petition praying that the three orders of respondent be set aside (R. 2). Without considering the merits, that court dismissed the petition for failure to exhaust administrative remedies (R. 457-458). It stated that under the amended regulations appeal to the Deputy Commissioner may no longer be a condition precedent to judicial review, but pointed out that the amendments "do not do away with the application for reconsideration, an administrative remedy not availed of by the petitioner" (R. 458).

SUMMARY OF ARGUMENT

The court below held that petitioner has not exhausted his administrative remedies, and hence cannot obtain judicial review, because he has not filed an application for reconsideration before the District Supervisor. In so far as appears from the opinion this decision would seem to mean that whenever an administrative agency permits a petition for rehearing or reconsideration to be filed, such a petition is a necessary prerequisite to judicial review. In our view, the doctrine that administrative remedies must be exhausted does not go that far. The application for reconsideration permitted by the regulations of the Alcohol Tax Unit performs, however, a different function than the

ordinary petition for rehearing. For the applicant receives an opportunity to except to findings and argue his case before the deciding official for the first time, and in a substantial proportion of cases the prior decision is reversed or modified. During the period of reconsideration the operation of the original order is stayed. These factors may so differentiate the application from an ordinary petition for rehearing as to justify a court in requiring a party to avail himself of the additional administrative remedy before seeking judicial relief.

ARGUMENT

Although the court below may not have intended to go so far, its opinion may be read as holding that a petition for rehearing before an administrative body is a general prerequisite to judicial review. In Point I we discuss the question whether and under what circumstances the doctrine of exhaustion of administrative remedies should require an application for rehearing. In Point II we apply the general principles to the peculiar procedure established by Treasury Regulations under the Federal Alcohol Administration Act.

I

THE ORDINARY PETITION FOR REHEARING SHOULD NOT BE A PREREQUISITE TO JUDICIAL REVIEW

The rule that courts will not act where administrative remedies remain available has its roots in

the practical desirability of minimizing the extent of judicial interference with the administrative process, as well as the analogous principle that a court of equity will not act as long as there is an adequate remedy at law.² The "long settled rule of judicial administration" (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50) prevents resort to the courts while there is still a chance that a person may obtain adequate relief from the administrative agency. The rule is not technical or jurisdictional, however, but is grounded on practical considerations. When the benefit in lessening the need for review of administrative orders and consequent interference with administrative action, and the value of the exhaustion rule to the administrative body, are outweighed by the burden which strict application of the rule might impose on both the agency and the aggrieved party, the rule is not applied.

We believe that any rigid requirement that an application for rehearing is essential to judicial review of administrative orders would in the vast majority of cases tend to prolong the administrative process and to increase the burden upon administrative agencies without compensating benefits. The application for rehearing is cus-

² See Berger, *Exhaustion of Administrative Remedies* (1939) 48 Yale L. J. 981, 988-990; Stason, *Timing of Judicial Redress from Erroneous Administrative Action* (1941), 25 Minn. L. Rev. 560, 568; Note (1938) 51 Harv. L. Rev. 1251, 1252-1254.

tomarily merely a prayer for an opportunity to reargue, which is usually denied. It will scarcely be gainsaid that most applications for rehearing, which raise no question not previously considered, waste the time both of the litigant and of the tribunal, whether it be judicial or administrative. Just as an order of a lower court is deemed final for purposes of appellate review despite the possibility of rehearing, so should the order of an administrative body. This Court has twice held that the absence of an application for rehearing is not sufficient to invoke the doctrine requiring the exhaustion of administrative remedies. *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 48-49; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 281-282. See also *Banton v. Belt Line Ry. Co.*, 268 U. S. 413, 416-417; but cf. *Vandalia R. Co. v. Public Service Commission*, 242 U. S. 255, 260-261.³

³ Lower court decisions holding applications for rehearing unnecessary are *Baltimore & O. R. Co. v. Railroad Commission*, 196 Fed. 690, 693 (C. C. Ind.); *Chicago Rys. Co. v. Illinois Commerce Commission*, 277 Fed. 970, 974 (N. D. Ill.); *Canadian River Gas Co. v. Terrell*, 4 F. Supp. 222, 228 (W. D. Tex.); *Contra Louisville & N. Ry. Co. v. United States*, 218 Fed. 89 (W. D. Va.); *Mallory Coal Co. v. National Bituminous Coal Commission*, 99 F. 2d 399, 406-407 (App. D. C.).

In commenting upon the implication in *Red River Broadcasting Co. v. Federal Communications Commission*, 98 F. 2d 282 (App. D. C.) that a petition for rehearing may be necessary, Dean Stason has declared:

"The circumstances of the case were somewhat unusual, for the reason that the complainant in the case had not been

In order that we might be able to apprise the Court of the practice of the various administrative agencies and of their views as to whether an application for rehearing should be required prior to judicial review, an inquiry was addressed to each agency asking for a statement of its practice and position on the question. The replies showed that whether or not rehearings were specifically permitted in statute or regulation, the agencies uniformly allowed applications for rehearing to be filed and gave them substantially the same consideration as they are given by a court. The agencies were also in substantial accord that, in the absence of an express statutory

a party to the proceeding before the commission, although he claimed to have been adversely affected by the order which granted a broadcasting license to a competitor. The decision may not mean that a party to the proceedings who has already presented his case to the tribunal must file a motion for rehearing under the permissive type of statute. Indeed, to impose such a requirement would seem to carry the exhaustion doctrine too far. To require a motion for rehearing in such cases, with its consequent delays, when the legislature creating the commission has not seen fit to make the motion mandatory as a condition precedent to the appeal, seems unnecessary to orderly procedure. The motion is almost sure to be overruled and thus prove quite futile. In this respect it differs from the appeal to a higher administrative agency, where futility is not to be anticipated, but, on the other hand, correction of error may be expected."

Stason, *Timing of Judicial Redress from Erroneous Administrative Action* (1941), 25 Minn. L. Rev. 560, 571-572. See also, Note (1935) 35 Col. L. Rev. 240, 241; Note (1938) 51 Harv. L. Rev. 1251, 1262; Note (1941) 29 Calif. L. Rev. 515, 516. Cantrac Berger, *Exhaustion of Administrative Remedies* (1939) 48 Yale L. J. 981, 988-990.

provision, to require rehearing in every case before resorting to the courts would be unwise and undesirable. The views of the administrative bodies themselves on such a matter should carry considerable weight.⁴

Nothing that has been said is intended to suggest that a petition for rehearing is unnecessary when a statute, such as the Federal Power Act⁵ and the Natural Gas Act,⁶ provides that an application for rehearing must be made prior to judicial review. Furthermore, at least when a statute contains the common requirement that no objection to the administrative order not urged before the administrative body shall be considered by the court, an application for rehearing would seem to be necessary as to those points not urged prior to the original administrative decision. Thus when findings accompany the administrative decision without any prior issuance of proposed findings, as is the practice under the regulations implementing the Federal Alcohol Administration Act, the contention that the findings are inadequate or unsupported can only be

⁴ The letters from the various administrative agencies are in the possession of the Solicitor General, and will be available to the Court.

⁵ 49 Stat. 860, 16 U. S. C. § 825l.

⁶ 52 Stat. 831, 15 U. S. C. § 717r.

⁷ E. g., in addition to Section 4 (h) of the Federal Alcohol Administration Act, quoted in the Appendix, *infra*, p. 30, the Securities Act of 1933 (48 Stat. 80, 15 U. S. C. § 77i); National Labor Relations Act (49 Stat. 454, 29 U. S. C. § 160 (e)).

raised in an application for rehearing or reconsideration. We do not read such statutory provisions, however, as meaning that contentions or "objections" advanced prior to the issuance of an order must be renewed subsequent to the order in an application for rehearing; such an interpretation does not comport with the obvious legislative purpose of the provision, and would have the unfortunate effects on the administrative process to which reference has been made.⁸ When Congress has wished to have all objections raised in a petition for rehearing it has said so specifically, as in the Federal Power and Natural Gas Acts.⁹

The considerations we have advanced would ordinarily not apply when administrative orders are being reviewed by a superior administrative official or body. In that situation, the remedy available to an aggrieved party is not in reality a "rehearing", although it is sometimes so described,¹⁰ but an appeal. In the *Abilene & South-*

⁸ The *Mallory Coal* case (99 F. 2d 399, 406-407) appears to take a contrary position. See also *Peoria Braumeister Co. v. Yellowley*, 123 F. 2d 637, 640 (C. C. A. 7).

⁹ See pp. 9-10, *supra*. These statutes provide that:

"No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission *in the application for rehearing* unless there is reasonable ground for failure so to do."

The italicized phrase is not contained in the Federal Alcohol Administration Act or other similar statutes.

¹⁰ As in Section 17 (9) of the Interstate Commerce Act, added by the Transportation Act of 1940, 54 Stat. 916, 49 U. S. C. § 17 (9).

ern case, *supra*, p. 10, this Court held, however, that when an administrative order became immediately effective a trial court had discretion to dispense with the administrative appeal as a prerequisite to judicial review.¹¹ But in the ordinary case it would seem that the courts should not interfere with administrative action which has not been prosecuted as far as the highest administrative official. See *United States v. Sing Tuck*, 194 U. S. 161; *Prentis v. Atlantic Coast Line Ry. Co.*, 211 U. S. 210, 229-230; *McGregor v. Hogan*, 263 U. S. 234; *Porter v. Investors Syndicate*, 286 U. S. 461; Stason, *Timing of Judicial Redress from Erroneous Administrative Action* (1941) 25 Minn. L. Rev. 560, 570.

We do not think that this case comes within any of the above three exceptions to what we conceive to be the general doctrine that applications for rehearing are unnecessary. The Alcohol Administration Act does not contain any provision requiring applications for rehearing prior to judicial review. Petitioner is not seeking to present any issues not raised before the District Supervisor (R. 2, 433). And the regulations are designed to provide that an appeal to a higher official is not essential to judicial review.

¹¹ The addition to the Interstate Commerce Act in 1940, of Section 17 (9), which provides that when a decision has been made by anything less than the full Commission an application for rehearing to the full Commission must precede a suit to set aside the order, was undoubtedly designed to overturn the decision in the *Abilene & Southern* case.

The latter point requires elaboration, inasmuch as an appeal to the Deputy Commissioner of Internal Revenue¹² is allowable. Prior to a revision effective June 4, 1942, the administrative regulations permitted applications for reconsideration to be filed with the District Supervisor within twenty days of the entry of his order, and an appeal to the Commissioner within ten days of the final order of the Supervisor. The Commissioner would set aside an order only if arbitrary or contrary to law or regulations. The operation of the order was automatically stayed during the twenty days (and an additional 10 days for appeals to the Commissioner) and the pendency of any further proceedings instituted during that period. While this regulation was in effect the Circuit Courts of Appeals for the Fifth and Seventh Circuits held that a person must exhaust these remedies, including appeal to the Commissioner, before asking judicial review. *Peoria Braumeister Co. v. Yellowley*, 123 F. 2d 637 (C. C. A. 7); *Leebern v. United States*, 124 F. 2d 505 (C. C. A. 5). Inasmuch as the appeal to the Commissioner brought the case to a higher official, we believe that these cases were correctly decided.

¹² The regulations define "Commissioner" as including the Deputy Commissioner in charge of the Alcohol Tax Unit (§ 182.6 (k), 7 Fed. Reg. 1865), and we shall refer to the latter as the "Commissioner."

In 1942, with the deliberate object of making it unnecessary for a party to appeal to the Commissioner before going to court, the regulations were amended by inserting the sentence: "Appeal to the Commissioner is not required." 7 Fed. Reg. 1858, 1890; 26 C. F. R. 182.257.¹³ An appeal to the Commissioner was still *permitted*, however, on the same terms as before.

In view of this provision in the present regulations, the Government does not suggest that appeal to the Commissioner from the District Supervisor is essential to the exhaustion of administrative remedies. As we have seen, the regulation was amended in order to make that unnecessary, and if there be doubt as to whether the amendment compelled this result, the Treasury's own interpretation of it, which has been communicated to and relied upon by persons subject to the Act, should be persuasive, and perhaps controlling.¹⁴ There may be some question as to the power of an administrator to create an administrative remedy, and at the same time prevent extension to it of the principle of exhaustion. Here the Secretary could have made the District Supervisor's

¹³ This revision contained other changes immaterial here.

¹⁴ *Bowles v. Seminole Rock & Sand Co.*, No. 914, 1944 Term, decided June 4, 1945; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143n; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 325; *American Tel. and Tel. Co. v. United States*, 299 U. S. 232, 242; *Morgan Stanley & Co. v. Securities & Exchange Commission*, 126 F. 2d 325 (C. C. A. 2).

decision final, and whether an administrative appeal should be allowed was for him to decide. Since the subject of the appropriate administrative procedure is within his control, it seems reasonable that he should be able to determine the essentiality of the administrative appeal.

II

THE NATURE OF THE APPLICATION FOR RECONSIDERATION UNDER THE ALCOHOL REGULATIONS IS SUCH AS TO JUSTIFY MAKING THE APPLICATION A PRE REQUISITE TO JUDICIAL REVIEW

We have treated at some length the question whether and under what circumstances the doctrine of exhaustion should require petitions for rehearing, inasmuch as that seemingly was the point decided below, and also because that presumably was the issue of importance which prompted this Court to grant certiorari. Our reasons for believing that petitions for rehearing should not be required are based upon the usual characteristics of the rehearing procedure. Customarily the petitioner is asking the agency or court to rehear his case after it has heard him fully once; he is not, or should not be, making a full dress presentation of his position, but only stating why the tribunal should rehear him. The tribunal examines the petition to ascertain if any significant point is raised which it has not fully considered, and does not accord it the same fresh consideration as an original argument or brief.

Although in form the application for reconsideration before the District Supervisor under the Federal Alcohol Administration Act resembles the orthodox petition for rehearing, in its practical operations it is quite different. A respondent in a proceeding before the Alcohol Tax Unit obtains a hearing before a Hearing Officer. 26 C. F. R. Cum. Supp., Sec. 182.250, *infra*, p. 33). At that hearing he may introduce evidence, file a brief and present oral argument. Secs. 182.250 and 182.252, *infra*, pp. 33-34. The Hearing Officer then prepares a summary of the evidence, findings of fact, and his conclusions for transmission with the original transcript of record to the District Supervisor. Sec. 182.253, *infra*, pp. 34-35. The briefs, if any,¹⁵ are sent up as a part of the record. The District Supervisor "after consideration of the record of evidence" approves or disapproves the proposed findings, makes such other findings as he thinks are warranted, issues his order, and serves the order with the approved findings upon the respondent. Sec. 182.254, *infra*, p. 35.

Up to this time the respondent has not seen the original proposed findings nor had opportunity to except to any findings. Nor has he had the opportunity to present oral arguments to the District Supervisor. Under the regulations

¹⁵ In many cases the parties do not choose to file briefs, but rely on the transcript and the oral argument.

he now has twenty days within which to file the "application for reconsideration" of the order on the grounds that it is contrary to law, or not supported by the evidence, or that he has newly discovered evidence available. Sec. 182.255 (a), *infra*, pp. 35-36. The regulations then somewhat ambiguously provide that the District Supervisor "may hear the application on a date and at a place to be fixed by him," and that "after hearing such application" he may affirm or vacate the order. Sec. 182.255 (b), *infra*, p. 36. Although the statement that the Supervisor "may" hear the application seems to make a hearing optional with him, the further declaration that the order may be affirmed or vacated "after hearing" contemplates that the District Supervisor must grant a hearing to the applicant before finally disposing of the application for reconsideration. The latter is the interpretation placed upon the regulation by the Alcohol Tax Unit, and since it is a reasonable construction presumably is binding upon the courts.¹⁰ The result is that in fact the applicant obtains an opportunity to argue the entire case orally, and if he so desires, to file a brief before the District Supervisor. The regulations further provide that during the time in which an application for reconsideration may be filed and until the final order, if an application is timely

¹⁰ See cases cited in note 14, *supra*, p. 16.

filed, the permit involved shall continue in force and effect (with an exception immaterial here). Sec. 182.255 (c), *infra*, p. 36. Accordingly, an application for reconsideration gives an applicant full protection against an order suspending or revoking his permit, and thus maintains the status quo.¹⁷

Thus the application for reconsideration for the first time gives a respondent an opportunity to argue orally before the official who makes the order. In addition it gives him his first chance to see and except to adverse findings of fact. These are desirable procedural safeguards, of value to a litigant even though he has no new evidence to present (cf. *Morgan v. United States*, 298 U. S. 468), and also to the Administrator seeking a just decision. The reconsideration, as the last step before the entry of the Supervisor's final order, is akin to an argument before an administrative body on exceptions to proposed findings, where all prior arguments have been made before an examiner; in such cases, if no exceptions

¹⁷ The denial of an application for a new permit is not stayed pending reconsideration. But since such an applicant has presumably not previously engaged in the business covered by the application, the status quo is maintained without suspending the effect of the denial. Moreover, such an applicant is not so seriously affected, and would be unlikely in any event to embark upon a new enterprise for the period of reconsideration and review. Petitioner in this case would be protected in so far as his wholesaler's basic permit is concerned but not in relation to his application for an importer's basic permit.

are taken to the examiner's findings, an order may be based upon the findings without more. The only difference here is that the original order, though in substance tentative, is issued by the deciding official and is in itself operative unless an application for reconsideration is filed.

That the application for reconsideration is regarded as an integral part of the procedural process and not as the equivalent of an ordinary petition for rehearing is shown by the requirement that an appeal to the Deputy Commissioner may be taken only "after review and reconsideration."

Sec. 182.257, *infra*, p. 37. The regulations specifically provide that "no objection to the final order of the district supervisor will be considered by the Commissioner, unless such objection was urged before the district supervisor in the permittee's application for reconsideration, or unless reasonable grounds for failure to urge such objections are set forth in the petition for review."

Sec. 182.257 (a), *infra*, p. 37. If reconsideration is deemed sufficiently important to be a prerequisite to an administrative appeal, for the same reasons it should be a prerequisite to judicial review.¹⁸

¹⁸ This has been the position of the Alcohol Tax Unit with respect to proceedings under the Federal Alcohol Administration Act. The Unit has not, however, regarded an application for reconsideration as essential to judicial review in proceedings involving permits for industrial alcohol under

The actual experience of the Alcohol Tax Unit tends to confirm the fact that the application for reconsideration before the District Supervisor is a substantial, and not merely a formal, remedy. The procedure in question became effective on July 1, 1940, when the Alcohol Tax Unit took over the administration of the Federal Alcohol Administration Act. Since that time 55 applications for reconsideration have been filed with District Supervisors. Forty-two of these cases were argued orally before the District Supervisors. In 8, or 14.5%, the District Supervisor reversed or set aside the original order, and in 11 other cases, or 20%, the order was modified or amended to respondent's benefit. In 3 other cases, changes were made in findings.¹⁹ If these figures are contrasted with the granting of three out of 190 petitions for rehearing by this Court during the 1943 Term,²⁰ the practical difference between the or-

Internal Revenue Code, Section 3114 (26 U. S. C. § 3114), although the latter proceedings are governed by the identical regulations. See page 2, *supra*.

¹⁹ These figures were compiled by the Alcohol Tax Unit for the information of the Court, at the request of the Solicitor General, from the orders of the District Supervisors, which are not published or distributed but are not confidential. This information, which has been verified and brought up to date, supersedes the table furnished to petitioner in July and printed on p. 36 of petitioner's brief. The underlying material showing the changes in the orders is in the possession of the Solicitor General and available to the Court.

²⁰ 320 U. S. 807-816; 321 U. S. 800-804; 322 U. S. 766-773.

thodox petition for rehearing and the remedy of reconsideration under the Alcohol Regulations is borne out.

The *Prendergast* case (262 U. S. 33, *supra*), which appears to be the leading case in this Court on the point, stressed two factors in support of its conclusion that petitions for rehearing are not essential to judicial review (262 U. S. at 48). The State Commission in that case, the Court noted, was not "required to grant" rehearing and the application for rehearing did not excuse compliance with the original order or otherwise stay its effect unless the Commission so directed. These reasons for dispensing with the need for rehearing are not present under the Alcohol Regulations. The effect of the first order annulling a permit is automatically suspended by the regulations during the period of reconsideration, and the applicant obtains an opportunity to argue a case—for the first time—before the official who issues the order. The reasoning of the *Prendergast* case indicates that these differences would justify a difference in result.

Petitioner contends that the Alcohol Administration Act in express terms authorizes appeal from the District Supervisor's original order. Section 4 (h) provides that "an appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or an-

nulling, a basic permit." If it be assumed that the District Supervisor stands in the place of the Administrator, the original orders on their face came within this language, since they annulled or denied petitioner's application for permits. (R. 421-427). But the same phrase, "any order," when used in the Urgent Deficiencies Act and other statutes has been construed as not including orders which are not final in nature. See *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 384-385, and cases cited. Thus review is not permitted of orders which are merely "preliminary" to the termination of the administrative proceeding. Although Congress intended that orders annulling basic permits be judicially reviewable, there is no reason to believe that it meant that the administrative decision in this field should be reviewed at an interlocutory stage any more than in the case of other administrative orders.

The orders of the District Supervisor prior to an application for reconsideration appear to be final orders of annulment or denial of permits. When read with the regulations, however, they are final only if a party does not wish an opportunity to except to the findings or argue a case before the official making the order, an opportunity which, as has been shown, often affords him relief. The same practical considerations which would lead a court to refuse to review an order of a trial ex-

aminer which will become final if no exceptions are filed would apply here.

Petitioner also contends that the provision for an application for reconsideration is not mandatory but permissive, inasmuch as the regulation states that a permittee *may* file an application, not that he must do so. It is true that the regulation is permissive. But it could not have imposed a mandatory requirement, inasmuch as no one would wish to compel parties to avail themselves of additional protective procedures if they do not desire to do so. This does not mean that they can seek judicial relief without exhausting administrative remedies which are permissive in nature. Many remedies which this Court has held to be essential prerequisites to judicial review were similarly "permissive." *Pittsburgh &c. Ry. v. Board of Public Works*, 172 U. S. 32, 44-45; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 229-230; *First National Bank v. Weld County*, 264 U. S. 450, 453-455; *Gorham Manufacturing Co. v. State Tax Commission*, 266 U. S. 265, 269-270; *Porter v. Investors Syndicate*, 286 U. S. 461, 468; *Petersen Baking Co. v. Bryan*, 290 U. S. 570, 575; *United States v. Illinois Central R. Co.*, 291 U. S. 457, 463.

CONCLUSION

Although ordinary petitions for rehearing should not be regarded as essential to judicial review, the practical considerations underlying the

doctrine of exhaustion of administrative remedies would justify requiring the filing of the application for reconsideration described in the alcohol regulations.

Respectfully submitted.

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OCTOBER 945.

APPENDIX A

A. THE ACT

The Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 201) provides in part as follows:

SEC. 2. * * * (d) The Administrator is authorized and directed to prescribe such rules and regulations as may be necessary to carry out his powers and duties. All rules and regulations prescribed by the Administrator shall be subject to the approval of the Secretary of the Treasury.

SEC. 3. * * * (a) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—

(1) to engage in the business of importing into the United States distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported.

This subsection shall take effect sixty days after the date upon which the Administrator first appointed under this Act takes office.

* * * * *

(c) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

SEC. 4. (a) The following persons shall, on application therefor, be entitled to a basic permit:

(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Administrator finds (A) that such person (or in case of a corporation; any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor; including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the

application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

* * * * *

(d) A basic permit shall be conditioned upon compliance with the requirements of section 5 (relating to unfair competition and unlawful practices) and of section 6 (relating to bulk sales and bottling), with the twenty-first amendment and laws relating to the enforcement thereof, and with all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto.

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

* * * * *

(g) A basic permit shall continue in effect until suspended, revoked, or annulled as provided herein, or voluntarily surren-

dered; except that (1) if leased, sold or otherwise voluntarily transferred, the permit shall be automatically terminated thereupon, and (2) if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock-ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Administrator.

(h) An appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon the Administrator, or upon any officer designated by him for that purpose, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order

of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. The finding of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). The commencement of proceedings under this subsection shall, unless specifically ordered by the court to the contrary, operate as a stay of the Administrator's order.

APPENDIX B.

The pertinent regulations are Sections 182.245-182.257 of the Treasury Regulations relating to industrial alcohol (26 C. F. R. Cum. Supp. 182.245-182.257, 7 Fed. Reg. 1858, 1889-1890, March 12, 1942) which were made applicable to orders denying, suspending, revoking or annulling basic permits entered under the authority of Sections 4 (b) and 4 (e) of the Federal Alcohol Administration Act (26 C. F. R. Cum. Supp. 171.4d, 5 Fed. Reg. 2549-2550, July 13, 1940). They read as follows:

SEC. 182.245 *Suspension of withdrawals or transportation.*—After citation for revocation of basic permit has been issued, withdrawals of alcohol or specially denatured alcohol by such permittee may, in the discretion of the district supervisor or Commissioner who issues the citation, be suspended or restricted to the quantity which, together with the quantity then on hand, is necessary to carry on legitimate operations under such permit until the final order is made in the revocation proceedings by the Commissioner or district supervisor before whom the same is pending. The district supervisor may, for cause, refuse to issue any purchase or withdrawal permit during such period. In the case of carriers, transportation of tax-free or specially denatured alcohol by the carrier may be similarly suspended or restricted. Secs. 3114, 3121 (b), 3170, I. R. C.)

SEC. 182.249 *Hearing.*—Unless waived by the permittee, or postponed, or transferred to another place, by a written agreement signed by the permittee and the attorney representing the United States and approved and filed by the hearing officer, or the Commissioner, or district supervisor, or by order of the hearing officer, Commissioner, or district supervisor, for good cause shown by either party, the hearing shall be held at the time and place stated in the citation, by the hearing officer named in the citation, or any other duly designated and appointed hearing officer assigned to hold such hearings. (Secs. 3114, 3121- (b), 3170, I. R. C.)

SEC. 182.250 *Evidence at hearing.*—The hearing officer shall, at the beginning of the hearing and throughout the proceedings, require that the parties attempt to arrive at such stipulations as will eliminate the necessity of taking evidence with respect to facts concerning which there is no substantial dispute. The evidence introduced at the revocation hearing on behalf of the United States or the permittee must consist of affidavits, depositions, duly authenticated copies of records and documents, and oral testimony of witnesses. Affidavits should not be used if the personal attendance of the affiant as a witness is reasonably possible, and the hearing officer may require a showing that the personal attendance of the affiant is not reasonably available before admitting an affidavit in evidence. When the record is made to show that the personal attendance of the witness is not reasonably possible, or such witness will not execute an affidavit or sign a written statement, the official report of the investigator or inspector of the results

of his investigation in that particular regard, identified by him as a witness at such hearing, as having been made immediately following the investigation, may be introduced in evidence.

(a) *Further evidence.*—Before closing a hearing the hearing officer shall definitely inquire of each party whether he has any further evidence to offer, which inquiry and the response thereto must be shown in the record. (Sec. 3114, I. R. C.)

SEC. 182.251 *Stenographic report of testimony.*—(a) *Stenographic record.*—A stenographic record shall be made of the testimony and proceedings, including stipulations and admissions of fact (but not arguments of counsel), at all revocation hearings and hearings on disapproval of applications for basic permits. A transcript of the evidence and proceedings at the hearing shall be made in all cases.

SEC. 182.252 *Arguments and briefs.*—At the conclusion of the testimony the hearing officer may hear arguments of counsel for the Government and for the permittee and may limit the time of such arguments at his discretion, and may also allow briefs to be filed on behalf of either party and fix a time within which the same shall be filed. (Sec. 3114, I. R. C.)

SEC. 182.253 *Findings of the hearing officer.*—Within a reasonable time after the conclusion of a hearing, the hearing officer shall render written findings of fact, in which he shall state briefly the issues of fact involved in the hearing, his conclusions thereon from the evidence adduced, and a summary of the evidence offered by both parties, and immediately transmit the original thereof, together with the original tran-

script of record, to the district supervisor or Commissioner, as the case may be. (Sec. 3114, I. R. C.)

SEC. 182.254 *Order revoking permit or dismissing proceedings.*—If the Commissioner or district supervisor, as the case may be, after consideration of the record of evidence taken at the hearing, approves the findings and conclusions of the hearing officer he shall make an order revoking the permit or dismissing the proceedings in accordance therewith. If he disapproves such findings or conclusions, he shall make such findings and order as in his opinion are warranted by the law and facts of the case. An original copy of the order made by the Commissioner or district supervisor, and a copy of the findings of the hearing officer, if they are approved, or a copy of the findings of the Commissioner or district supervisor, if the findings of the hearing officer are disapproved, shall be forwarded to the permittee or his attorney of record in the proceedings.

(a) *Notice to Commissioner.*—When the district supervisor makes an order revoking a permit, he will furnish a copy of the order to the Commissioner. Should such order be subsequently set aside upon reconsideration, or review by a court of equity, the district supervisor will so advise the Commissioner. (Secs. 3114, 3121 (b), 3170, I. R. C.)

SEC. 182.255 *Reconsideration of order revoking permit.*—(a) *Time for filing application.*—Within 20 days after an order is made by the Commissioner or district supervisor revoking a basic permit, the permittee may file an application with such Commissioner or district supervisor, for a recon-

sideration of such order, on one or more of the following grounds:

- (1) The order is contrary to law, or
- (2) Is not supported by the evidence, or
- (3) Because of newly discovered evidence which the permittee with due diligence, was unable to produce at the hearing.

If the application is based on grounds (1) or (2), the permittee shall specify therein, by reference to the record, in what respects the order is contrary to law or is not supported by the evidence, as the case may be. If the application is based on ground (3), the permittee shall summarize therein the newly discovered evidence and set forth why he was unable to produce such evidence prior to the closing of the record.

(b) *Time of hearing.*—The Commissioner or district supervisor, with whom such application is filed, may hear the application on a date and at a place to be fixed by him. The Commissioner or district supervisor, as the case may be, after hearing such application, may either affirm the order of revocation previously made, or may vacate and set aside such order and dismiss the proceedings or order a new hearing of the evidence before a designated hearing officer.

(c) *Permit privileges.*—During the period above provided for filing application for reconsideration, and until final order is duly made after such reconsideration, if such application is filed within the time provided therefor, the permit involved shall continue in force and effect, except as to restrictions on withdrawals or transportation as may be ordered by the Commissioner or district supervisor, as provided in section

182.245. (Secs. 3114, 3121 (b), 3170 I. R. C.)

* * * * *

SEC. 182.257 *Appeal to the Commissioner.*—Appeal to the Commissioner is not required. However, the Commissioner may, in his discretion, in order to insure uniformity of administrative action, entertain an appeal, after review and reconsideration as provided in section 182.255, from an order of revocation of a basic permit by a district supervisor, if filed with the Commissioner within 10 days of the date of the final order.

(a) *Petition.*—The petition for review must set forth facts tending to show action of an arbitrary nature, or of a proceeding and action contrary to law or regulations. No objection to the final order of the district supervisor will be considered by the Commissioner unless such objection was urged before the district supervisor in the permittee's application for reconsideration, or unless reasonable grounds for failure to urge such objections are set forth in the petition for review.

(b) *Permit Privileges.*—If such request is filed within the required time, the permit involved shall continue in force and effect until the final order by the Commissioner, except as to such restrictions upon withdrawals or transportation as may be imposed by the district supervisor, as provided in section 182.245. (Sec. 3114, I. R. C.)

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SUPREME COURT OF THE UNITED STATES.

No. 51.—OCTOBER TERM, 1945.

Forest E. Levers, Administrator,
etc., Petitioner,

vs.

A. V. Anderson, District Supervisor,
Alcohol Tax Unit.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Tenth Circuit.

[November 5, 1945.]

Mr. Justice BLACK delivered the opinion of the Court.

The petitioner's permit to operate a wholesale liquor business under the Federal Alcohol Administration Act, 49 Stat. 977, was annulled by an order of the District Supervisor of the Alcohol Tax Unit of the Bureau of Internal Revenue of the United States. At the same time the Supervisor denied petitioner's applications for an importer's and a new wholesaler's permit. The Supervisor was duly authorized to act in these matters.¹ Section 4(h) of the Act authorizes an applicant or permittee to appeal to the Circuit Court of Appeals within sixty days after the entry of orders denying or annulling the permits. A petition for appeal was filed within sixty days. The Circuit Court of Appeals dismissed the appeal, 147 F. 2d 547, on the ground that petitioner had failed to exhaust his administrative remedies since he had not first filed a motion for reconsideration of the Supervisor's order as permitted by Treasury Regulations, 26 C. F. R. Cum. Supp. 182.255, reading in part as follows:²

¹ 53 Stat. 561; 54 Stat. 1231; 54 Stat. 230, 231; Treasury Order No. 30, 26 C. F. R. Cum. Supp. 174.1a; 5 Fed. Reg. 2212; Treas. Decision 4982, 26 C. F. R. Cum. Supp. 174.4e, 5 Fed. Reg. 2549.

² The Circuit Court of Appeals also referred to the petitioner's failure to take an appeal to the Deputy Commissioner of Internal Revenue, as allowed by Amended Treasury Regulation 182.257. That regulation provides that: "Appeal to the Commissioner is not required. However, the Commissioner may, in his discretion, in order to insure uniformity of administrative action, entertain an appeal after review and reconsideration as provided in § 182.255, from an order of revocation of a basic permit by a district supervisor, if filed with the Commissioner within 10 days of the date of the final order." The government concedes that the first sentence of this regulation, "Appeal to the Commissioner is not required," was added to the regulation as it originally stood for "the deliberate object of making it unnecessary for a party to appeal to the Commission before going to Court." Under these circumstances we do not discuss it further. Cf. *Georgia Braumeister Co. v. Yellowley*, 123 F. 2d 637; *Loeborn v. United States*, 124 F. 2d 545, both decided before the first sentence was added.

"(a) . . . Within 20 days after an order is made by the Commissioner or district supervisor revoking a basic permit, the permittee may file an application with such Commissioner or district supervisor, for a reconsideration of such order, on one or more of the following grounds:

"(1) The order is contrary to law, or

"(2) It not supported by the evidence, or

"(3) Because of newly discovered evidence which the permittee with due diligence, was unable to produce at the hearing."

We thought the question involved important and granted certiorari.

Whatever might be the case in other circumstances, it is clear that where as here judicial review is provided in the Act itself, the petitioner's right of appeal to the courts is to be determined by looking to the statute, the valid regulations promulgated pursuant to it and proven administrative practice throwing light upon their meaning. In construing the Act, however, we must be mindful of the "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51. But this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought. This is shown by our past decisions,³ from which we see no reason to depart. Government counsel, appearing for Respondent, do not defend the dismissal of petitioner's appeal on such a sweeping assumption. On the contrary, they assert that motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders.

But Government counsel insist that the rehearing here involved is far more than a formality, and that we should therefore read the Act and regulations as if these barred judicial review prior to an application for a rehearing.⁴ Of course we recognize that

³ *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 280-282; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 48-49.

⁴ This has been expressly done in several statutes. See for example 49 Stat. 860; 52 Stat. 831. Of course the mere fact that the regulations might bar judicial review is not conclusive, for the court will consider whether these are consistent with the legislative intent.

in a particular administrative pattern new opportunities to challenge afforded by the motion for rehearing may subject an order to such critical administrative review as to reduce it to the level of a "mere preliminary or procedural" status, thereby divesting it of those qualities of administrative finality essential to invocation of judicial review. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 384-385. But we do not think that is the case here.

The orders here challenged were entered after a hearing and they were "of a definitive character dealing with the merits of a proceeding". *Federal Power Commission v. Metropolitan Edison Co.*, *supra*, 384. The evidence was taken before, and the findings of fact were made by, a hearing commissioner before whom petitioner was represented by counsel. These findings were then approved by the district supervisor who entered the orders. True the findings were approved and the order ~~was~~ made by the district supervisor without an opportunity to petitioner to except to his adverse findings of fact or to present oral argument to him. And a rehearing if granted would have afforded petitioner for the first time an opportunity to see and except to adverse findings of fact and might also have given it a chance to present oral argument to the officer who made the order. But the regulations only provide that the Supervisor "may hear the application" for a rehearing.⁵ No other language of the regulations, and no satisfactory proof of publicly established practice under them, persuades us that the "may" means must, or that the Supervisors were required to hear oral argument. Thus, despite the fact that the regulations permit a stay pending the motion, there is no assurance that a rehearing will be granted so as to afford an opportunity to except to fact findings or argue orally before the Supervisor. Consequently, whatever weight such factors might be accorded in determining administrative finality of the order is absent here.

Our conclusion is that the motion is in its effect so much like the normal, formal type of motion for rehearing that we cannot

⁵ The only relevant provision, 26 C. F. R. Cum. Supp. 182.255, reads:

"(b) The Commissioner or district supervisor, with whom such application is filed, may hear the application on a date and at a place to be fixed by him. The Commissioner or district supervisor, as the case may be, after hearing such application, may either affirm the order of revocation previously made, or may vacate and set aside such order and dismiss the proceedings or order a new hearing of the evidence before a designated hearing officer."

read into the Act an intention to make it a prerequisite to the judicial review specifically provided by Congress. Whether the Circuit Court of Appeals was possessed of power to exercise a discretion to stay its review until an application was made to the Supervisor to grant a rehearing is a question which was not decided and upon which we express no opinion. See *United States v. Abilene & Southern Ry. Co.*, *supra*, 282.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.